American Indian Law Review

Volume 13 | Number 2

1-1-1988

Federal Recent Developments

FEDERAL RECENT DEVELOPMENTS

ABORIGINAL TITLE: Submerged Lands and Wetlands

In *Yankton Sioux Tribe v. South Dakota, 796 F.2d 241 (8th Cir. 1986)*, the tribe sought to establish its title to the bed of Lake Andes, which was within the 400,000 acres of land guaranteed to the tribe by treaty in 1858. After determining that the lake was navigable at the time of the treaty and at the time of South Dakota statehood, the district court ruled that the tribe had aboriginal title to the lake bed.[1] The district court held that the tribe, not the state, owned the lake bed.

South Dakota claimed its ownership of the lake bed through the equal footing doctrine of statehood, i.e., that the purchase of the Louisiana Territory in 1803 by the United States effectively held the land in trust for future states. The appeals court found that although the tribe established possession before South Dakota's statehood, the possession could not be traced back earlier than 1810. The court found that the prior U.S. purchase defeated the tribe's claim to the lake bed. Reversing the district court, the Eighth Circuit held that when sovereign title is in place and the operation of the equal footing doctrine begins before any claim of aboriginal title has ripened, the state's claim of ownership was preeminent.

1 Aboriginal title provides original natives of the United States the exclusive right to occupy the lands and waters used by their ancestors prior to the United States' assertion of sovereignty over these areas. Yankton Sioux Tribe v. Nelson, 521 F. Supp. 463, 466 (D.S.D. 1981).

CIVIL RIGHTS: Employment

In *Dille v. Council of Energy Resource Tribes, 801 F.2d 373 (10th Cir. 1986)*, five female former employees of the Council of Energy Resource Tribes (CERT) filed discrimination charges against the CERT. The district court dismissed the charges, which alleged that the CERT had violated Title VII of the Civil Rights Act of 1964 by maintaining sex-segregated job classifications. The CERT consists of a coalition of thirty-nine Indian tribes formed to collectively manage their energy resources. The district court found that because Indian tribes were expressly exempted from Title VII's statutory definition of "employer," the activities of the CERT were not governed by Title VII.

Title VII clearly exempts a single Indian tribe from the definition of "employer."[1] Recognizing the principle of construction that statutes passed for the benefit of Indian tribes should be liberally construed in favor of the tribes, the Tenth Circuit determined that Congress intended to protect collective efforts by Indian tribes as well as individual Indian tribes. Because the CERT consisted exclusively of member Indian tribes and because the organization's decisions were made exclusively by designated members, the court concluded that the CERT fell directly within the scope of the Indian tribe exemption of Title VII.

1 42 U.S.C. § 2000e(b)(1972).

ENTITLEMENT TO FEDERAL BENEFITS

In *Zarr v. Barlow, 800 F.2d 1484 (9th Cir. 1986)*, Diane Zarr, an enrolled member of the Sherwood Valley Band of Pomo Indians, applied to the Bureau of Indian Affairs (BIA) for Indian higher education grants. Her application was denied because, though Zarr was certified as having 7/32-degree Indian blood, the applicable regulation required at least ¼-degree Indian blood.[1] Seeking an order to compel the BIA to authorize the grant, Zarr exhausted her administrative remedies and was summarily denied relief in district court.

Finding that the standard under the administrative regulation was less inclusive than the statute under which the administrative standard was promulgated, the Ninth Circuit held that the regulation was in violation of the law. The court analyzed various possible sources of authority for the administration of the ¼-degree Indian blood restriction. First, the court considered whether 25 U.S.C. § 471 conferred authority upon the BIA to distribute moneys for higher education grants, finding that it did not confer such authority.[2] However, congressional authority for the grant program was found in the Snyder Act.[3]

1 25 C.F.R. § 40.1 (1986).

2 25 U.S.C. § 471 (1934) is part of the Indian Reorganization Act and provides authority "for loans to Indians for the payment of tuition and other expenses in recognized vocational and trade schools."

3 The Snyder Act provides in part: "The Bureau of Indian Affairs, under the supervision of the Secretary of the Interior, shall direct, supervise, and expend such moneys as Congress may appropriate, for the benefit, care, and assistance of Indians

While Zarr could not be included in the Indian Reorganization Act definition of "Indian,"[4] she could be included in the definition found in the Indian Financing Act (IFA),[5] which provides for the single administration of numerous separate Indian financing programs, including programs under the above-mentioned Indian Reorganization Act of 1934.[6] For the purpose of the IFA program, section 1452 of the IFA redefines the term "Indian" to mean any person who is a member of a federally recognized tribe.[7] The legislative history of the IFA was found to support the conclusion that Congress intended that Zarr should be included among those persons eligible to participate in programs promulgated under the IFA. Finding that the regulation defeated the congressional purpose expressed in the IFA, the court held that the regulation violated the governing legislation.

The BIA argued that 25 U.S.C. § 297 (enacted May 25, 1918) exemplified congressional use of the ¼-degree standard for Indian educational assistance and demonstrated the reasonableness of such a standard. The court rejected this argument on the basis that (1) section 297 applies only to expenditures in BIA Indian day schools; (2) section 297 has been repealed and substituted by an amendment to 25 U.S.C. § 2008(f) (1986), which rejects the single ¼-degree eligibility restriction; and (3) section 1452 of the IFA, by failing to expressly provide the Indian blood quantum factor, impliedly supports the use of the newer, less restrictive standard found in the IFA. To the extent of any ambiguity between the 1921 Snyder Act, the 1934 Indian Reorganization Act, the 1974 Indian Financing Act, and the 1985 repeal of section 297 and amendment of section 2008(f), any doubtful or ambiguous expressions must be resolved in the Indians' favor.[8]

---

throughout the United States for the following purposes: General support and civilization, *including education*." 25 U.S.C. § 13 (1921) (emphasis added).

4 25 U.S.C. § 480 (1939) states: "On May 10, 1939, section 480 was added, providing that [o]n and after May 10, 1939, no individual of less than one-quarter degree of Indian blood shall be eligible for a loan from funds made available in accordance with the provisions of section 471."

5 25 U.S.C. §§ 1451-1543 (1974).

6 Section 1462 of the IFA specifically authorizes loans for educational purposes.

7 Section 1452 of the IFA provides: "For the purpose of this chapter, the term—(b) 'Indian' means any person who is a member of any Indian tribe . . . which is recognized by the Federal Government as eligible for services from the Bureau of Indian Affairs."

8 *Zarr*, 809 F.2d 1484 (9th Cir. 1986), citing Bryan v. Itasca County, 426 U.S. 373, 392 (1976).

The court further rejected the BIA's argument that Congress ratified the ¼-degree standard based upon its prior appropriations for BIA budget requests, requests which explicitly cited the ¼-degree standard. Finding that the BIA had failed to sustain "the heavy burden of demonstrating congressional knowledge of the precise course of action alleged to have been acquiesced in,"[9] the court concluded that the BIA did not establish that Congress was aware of, much less approved of, the ¼-degree blood quantum.

The court, having determined that the regulation was not within the scope of authority conferred upon the BIA and not reasonably related to congressional intent, never reached Zarr's trust obligation and equal protection arguments. Zarr, under the circuit court's decision, was granted a remand and a reversal of the district court's summary judgment.

9. *Id.* at 1493, quoting Rincon Band of Mission Indians v. Harris, 618 F.2d 569, 573 (9th Cir. 1980).

JURISDICTION: Federal Courts

In *United States v. Barquin, 799 F.2d 619 (10th Cir. 1986),* a member of the Shoshone-Arapahoe Tribe was indicted in federal district court under 18 U.S.C. § 666(c), of unlawfully paying $1,000 to an official of the Northern Arapahoe Business Council to obtain favorable treatment on the award of a contract for a reservation project. Section 666(c) imposes criminal sanctions on a person who offers a bribe to a governmental agent. On appeal, the defendant entered a conditional plea of nolo contendere, moving to dismiss the indictment on two grounds: (1) the definitional provisions of section 666(c) exclude Indian tribes as an entity, and (2) section 666(c) is unconstitutionally vague, ambiguous, and overbroad. The defendant's motion was summarily denied. The sole issue on appeal was whether the person to whom the defendant's payment was made was an agent of a local government agency. The defendant contended that a "political subdivision" connotes a subdivision of a state, and since an Indian tribe is "a sovereign entity wholly independent of a State," Indian tribes and their agencies fall outside the statutory defini-

tion.[1] The government contended that because the Arapahoe Tribe is geographically located within the state of Wyoming, it was by definition a local government agency.

Because section 666 uses sufficiently exacting terms, the court felt it could not extraneously analyze the general objectives of the section. The court had already recognized that because section 666 is punitive, it must be strictly construed.[2] Due to the inherent sovereignty of the tribe, the tribe was found to fit outside the statutory definition of "local government agency" and was not a "subdivision" of any entity. The court based this conclusion on its analysis of the tribe's government and the tribal government's place among the "hierarchy of governments," rather than the behavior of the tribal members. The circuit court indicated that if Congress had intended to include Indian tribes within the meaning of section 666, it would have done so with specificity. The case was remanded to the district court with instructions to dismiss the indictment.

1 18 U.S.C. § 666(d)(2), (3) (1986), the definitional section of the statute, provides " 'government agency' means a *subdivision of* the executive, legislative, judicial, or other branch of *a government* . . . ; and 'local' means of or pertaining to a *political subdivision* within a State." (Emphasis added.)

2 799 F.2d 619 (10th Cir. 1986), citing Dowling v. United States, 473 U.S. 201 (1985).

SOVEREIGNTY: Licensing and Regulation

In *Superior Oil Co. v. United States, 798 F.2d 1324 (10th Cir. 1986)*, Superior Oil had filed suit in federal district court seeking declaratory and injunctive relief against the United States, various federal officials, and the Navajo Tribe, its tribal council, and tribal officials.[1] The plaintiffs contended that federal officials, by failing to approve lease assignments, and tribal officials, by denying Superior Oil the right to undertake seismic operations on the land covered by the lease, intentionally allowed the leases to expire. Both actions were alleged to constitute unlawful confiscation of Superior Oil's property rights.

1 Superior Oil Co. v. United States, 605 F. Supp. 674 (D. Utah 1985).

The district court found that approval of assignments and permits was discretionary on the part of the tribal council chairman. The district court held that it was without jurisdiction to grant relief against the Navajo Tribe and its official because of the tribal immunity.

On appeal, the court held that when the issue is whether a tribal court has exceeded the bounds of its jurisdiction in a case involving civil subject matter jurisdiction, the issue is a federal question and the federal district court is competent to review a tribal court determination under 28 U.S.C. § 1331. However, the court believed that the district court should have delayed addressing the issue of tribal sovereign immunity until Superior Oil exhausted its tribal remedies.

If the Navajo Tribe and its officials intentionally and arbitrarily withheld consent to assignments of leases and requests for seismic permits, the court deemed they may have acted in bad faith. The court remanded the case with instructions that if the district court found that the Navajo Tribe and its officials withheld action on the requests of Superior Oil to harass the plaintiff or destroy the value of the leases, 28 U.S.C. § 1331 would not require exhaustion of tribal remedies as a prerequisite to obtaining jurisdiction in federal district court.

TAXATION: Cigarettes

Two Delaware Indian brothers sold untaxed cigarettes and other tobacco products from a smokeshop located on Indian land. In *Brooks v. Nance, 801 F.2d 1237 (10th Cir. 1986)*, the brothers brought suit under the Tax Injunctive Act (TIA),[1] alleging that their civil rights were violated when Oklahoma state officials seized for forfeiture the untaxed cigarettes on sale at the smokeshop. The plaintiffs sought declaratory relief, injunctive relief, and damages. The tribal court dismissed the case, holding that section 1341 of the TIA deprived the court of subject matter jurisdiction.[2] Section 1341 is, in effect, a broad limitation against the use of federal equity powers regarding state collection of taxes.

1. 42 U.S.C. § 1983 (1982).

2. The Tax Injunctive Act provides "The district courts shall not enjoin, suspend or restrain the assessment, levy or collection of any tax under State law where a plain, speedy and efficient remedy may be had in the courts of such State."

The Tenth Circuit rejected the three contentions presented by the appellants. First, appellants contended that their allegation was a civil rights matter with the state tax liability being an incidental dispute. Thus, the TIA should not bar the court's jurisdiction. The court disagreed, concluding that the prohibition of section 1341 could not be avoided by alleging a civil rights violation.

Second, the Brooks brothers contended that the federal court had jurisdiction because Oklahoma had no jurisdiction over Indian country. The court determined that it was well established that the exercise of jurisdiction by state courts over claims by Indians against non-Indians, even when those claims arose in Indian country, "would not interfere with the right of tribal Indians to govern themselves under their own laws."[3]

Finally, appellants contended that if the TIA was found to be applicable to this case, the state's action fell under the exception within the Act. The exception requires that the jurisdictional bar does not apply unless "a plain, speedy and efficient remedy may be had in the courts of such State."[4] The appeals court construed this exception narrowly. After reviewing the remedies available in Oklahoma's state court system, the court concluded that for purposes of section 1341, the Oklahoma courts provided an adequate remedy to challenge the lawfulness of the state government practices under the Oklahoma Cigarette Tax Act.

In conclusion, the Tenth Circuit noted that the doctrine of comity provided an additional basis for depriving the federal courts of jurisdiction. The principle of comity bars federal courts from granting either injunctive or declaratory relief in state tax cases.[5] The principle of comity barred the federal court system from considering the alleged unconstitutional administration of the Oklahoma tax system.

3. 801 F.2d 1237, 1240 (10th Cir. 1986), citing Three Affiliated Tribes v. Wold Eng'g, 467 U.S. 138, 148 (1984).

4. 28 U.S.C. § 1341 (1948).

5. 801 F.2d at 1241, citing Fair Assessment in Real Estate Ass'n v. McNary, 454 U.S. 100, 116 (1981).

TAXATION: Federal Income

In *Dillon v. United States, 792 F.2d 849 (9th Cir. 1986)*, individual members of the Puyallup Tribe were selling cigarettes on trust lands exempt from federal income tax. The Internal

Revenue Service (IRS) assessed federal tax on income from the cigarette sales and the Tax Court upheld the IRS determinations. The tribal members claimed they were exempt from payment of federal income taxes under the Medicine Creek Treaty of 1854, the General Allotment Act of 1887, and the United States Constitution.

The Ninth Circuit ruled that the Medicine Creek Treaty had not been violated because the income tax was not a burden on a treaty-protected right; rather, it was on income earned from the exercise of that right. Considering the General Allotment Act, the court applied the "derived from the land" standard to rule that income from cigarette sales was not tax exempt under the Allotment Act. The court also found that taxing cigarette sales, though not taxing income derived from mining, timber, and agriculture, was not a violation of the equal protection clause of the fifth amendment of the Constitution. This rationale was again based on the "derived directly from" rule.

The tribal members argued that if they were leasing the land, the income from those leases would be nontaxable. Therefore, at least the amount of the income from cigarette sales transacted on leased land should be nontaxable. The court rejected the argument, reiterating that any tax exemption would have to be for income "directly derived from" the land and that none of the income from cigarette sales qualified. The appeals court thereby affirmed the decisions of the district court and the Tax Court.

TRIBAL COURTS: Jurisdiction

In *United States v. Yakima Tribal Court, 794 F.2d 1402 (9th Cir. 1986)*, two Yakima Indian sisters, Viola Sohappy and LaRena Sohappy Brown, sought to prevent federal officials from rerouting an irrigation canal crossing their property. The Sohappys initially obtained from the tribal court an order permanently restraining the irrigation project officials and its employees from entering the Sohappys' land. The United States then filed a complaint in federal district court against the Yakima Tribal Court, seeking a declaration that the tribal court's injunction was void and an injunction restraining any further interference with the project.

The district court granted the government's motion for summary judgment, rejecting the tribal court's claim that it was im-

mune from suit. Tribal immunity was held not to operate against the federal government. In contrast, the fact that the project engineer was found to be acting within the scope of his official capacity meant that the federal government's sovereign immunity barred the action taken by the tribal court. The district court declared the tribal court's orders void and issued a permanent injunction prohibiting the tribal court from enforcing its order.

On appeal, the Ninth Circuit affirmed the district court's decision. Because the Sohappys had granted the federal government a right-of-way across their property for irrigation purposes while the appeal was pending, the appeals court considered the issue of mootness. Though a settlement had been reached between the Sohappys and the Interior Department (parties to the tribal court proceedings), none of the parties to the present appeal (the tribal court, its chief judge, and the United States) were involved in the settlement. In addition, the tribal court's order appeared too broad, restraining the government from entry onto the land for any purpose.

The district court's conclusion that the tribal court proceedings were an uncontested suit against the federal government barred by sovereign immunity was upheld. The circuit court found that the state officers were acting within the scope of their official capacities and, therefore, a simple mistake of law or fact by the official did not override the sovereign immunity of the United States.[1]

Also dismissed by the circuit court was appellants' argument that tribal sovereign immunity barred the action. The court held that "the United States may sue Indian tribes and override tribal sovereign immunity."[2] Last, the court rejected the tribal judge's assertion o. judicial immunity. In the court's view, that defense does not serve to bar injunctive relief against a judicial officer acting in his judicial capacity.[3]

1 The court cited Pennhurst State School & Hosp. v. Halderman, 465 U.S. 89, 113 (1984), and Aminoil U.S.A., Inc. v. California Water Res. Control Bd., 674 F.2d 1227, 1234 (9th Cir. 1982).

2 794 F.2d at 1408, citing United States v. White Mountain Apache, 784 F.2d 917, 920 (9th Cir. 1980).

3 *Id.*, citing Pulliam v. Allen, 466 U.S. 522, 541-42 (1984).